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**Supreme Court of the United States**

**OCTOBER TERM, 1937**

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**No. 761**

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**WILLIAM MAHONEY, AS LIQUOR CONTROL COMMISSIONER  
OF THE STATE OF MINNESOTA, ET AL.,**

*Appellants,*

**VS.**

**JOSEPH TRINER CORPORATION,**

*Appellee.*

---

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF MINNESOTA.**

---

**BRIEF OF APPELLANTS.**

---

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OF THE STATE OF MINNESOTA, ET AL.,

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VS.

JOSEPH TRINER CORPORATION,

*Appellee.*

---

## BRIEF OF APPELLANTS.

---

### REPORT OF OPINION OF THE LOWER COURT.

The official report of the opinion of the District Court of the United States, District of Minnesota. Fourth Division, being a specially constituted three-judge court under Title 28, Section 380 of the United States Code Annotated, the lower court from which this appeal is taken in this proceeding, is found in 20 Fed. Supp. 1019.

### STATEMENT OF THE FACTS.

Joseph Triner Corporation, the appellee herein, is and has been at all times mentioned herein a corporation organized under the laws of the State of Illinois (R. 22). Its business is that of manufacturing and rectifying alcoholic liquors for the purpose of sale (R. 22). Its manufacturing and rectifying plant is situated in Chicago, Illinois (R. 22). It has complied with the statutes of the State of Minnesota relative to foreign corporations doing business in that state, and on February 19, 1934, established an office, warehouse and place of business in the City of St. Paul, Minnesota, which office was conducted, operated and maintained by appellee during all of the time mentioned herein (R. 22). The business carried on by appellee in Minnesota was that of a wholesaler engaged in the sale of intoxicating liquors to retailers (R. 22). On the said 19th day of February, 1934, appellee was granted a license by the Liquor Control Commissioner of Minnesota, which license permitted appellee to manufacture intoxicating liquors and sell the same in Minnesota as a wholesaler (R. 23). The license was in full force, and effect during all of the times herein mentioned (R. 23). Prior to the commencement of the above entitled action, appellee, in compliance with certain rules and regulations of the Liquor Control Commissioner of Minnesota, registered and filed with said Liquor Control Commissioner the various brand names of the intoxicating liquors which appellee intended to import into and sell in the State of Minnesota (R. 24). At the time of registering and filing said brand names, appellee further furnished the Liquor Control Commissioner a chemical analysis of each of said brands of liquor. Each analysis was accepted and permission was granted to appellee to import said brands of intoxicating liquors into

the State of Minnesota and sell the same therein at wholesale (R. 24). Each of said brands of intoxicating liquors was manufactured by appellee in Chicago, Illinois (R. 24). Since February 19, 1934, appellee has shipped from Chicago, Illinois to its warehouse and place of business in St. Paul, Minnesota, intoxicating liquors manufactured by it and bearing the brand names as registered and filed with the Liquor Control Commissioner of Minnesota aggregating in amount the sum of approximately ninety thousand dollars, which intoxicating liquors were sold in the State of Minnesota to more than two hundred and fifty retail dealers (R. 25). For the purpose of establishing and building up its business in the State of Minnesota, appellee has expended approximately ten thousand dollars in advertising and sales promotion work (R. 25). Appellee has built up and established an extensive demand for each of the said brands of intoxicating liquors and has realized a net profit from the business carried on by it in the State of Minnesota of approximately twelve hundred dollars per month (R. 25). On April 29, 1935, Laws of Minnesota, for 1935, Chapter 390 was enacted and in pursuance with the provisions thereof the Liquor Control Commissioner of Minnesota notified appellee to cease and desist from importing any brand or brands of intoxicating liquors containing more than twenty-five per cent of alcohol by volume ready for sale without further processing unless such brand or brands were duly registered in the patent office of the United States (R. 25-26). None of the brands of intoxicating liquors imported by appellee into the State of Minnesota have been registered in the patent office of the United States and they all are affected by said Chapter 390 (R. 26). By virtue of said law, appellee has been prevented from importing any of said brands into

Minnesota without first registering said brands in the patent office of the United States (R. 26). At least six months time is required to register a brand name with the patent office, and appellee would be required to expend approximately sixteen hundred dollars to register its brands (R. 28, 29). In the case of some of the brand names, a reasonable probability exists that they cannot be registered at all (R. 29). Since the enactment of Chapter 390, Laws of Minnesota for 1935, there have been, and there now are, citizens and residents of the State of Minnesota engaged in the business of importing brands of intoxicating liquors into the State of Minnesota containing more than twenty-five per cent of alcohol by volume for the purpose of further processing the same in the State of Minnesota, which said brands are not now and never have been registered in the patent office of the United States, which said course of business is not prohibited by said Chapter 390 (R. 28). There are also a number of manufacturers and wholesalers of intoxicating liquors who are engaged in importing into the State of Minnesota from other states intoxicating liquors containing more than twenty-five per cent of alcohol by volume under brand names that have been registered in the patent office of the United States, which said course of business is not prohibited by said Chapter 390 (R. 28). In many instances the intoxicating liquors manufactured by appellee, the brand names of which are not registered in the patent office of the United States, are identical in kind, ingredients and quality with intoxicating liquors the brand names of which are registered in the patent office of the United States, and which intoxicating liquors are legally being imported into the State of Minnesota (R. 28). The registration of brand names in the patent office of the United States is not dependent upon the

kind, ingredients or quality of the intoxicating liquor to which the brand is affixed (R. 28).

Laws of Minnesota for 1935, Chapter 390, provides that:

"No licensed manufacturer or wholesaler shall import any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume ready for sale without further processing unless such brand or brands shall be duly registered in the patent office of the United States." (R. 25, 26).

The matter was heard in the United States District Court, District of Minnesota, Fourth Division, before a regularly constituted three-judge court organized under the provisions of Section 380 of the United States Code Annotated upon the petition of appellee for a permanent injunction. The lower court decided that the statute was unconstitutional as violative of the equal protection clause of the Constitution of the United States and granted, first an interlocutory injunction, and then a permanent injunction against the enforcement thereof.

This appeal is taken from the final decree and judgment.

### **SPECIFICATION OF ERRORS TO BE URGED.**

The District Court of the United States, for the District of Minnesota, Fourth Division; and the special three-judge court organized and sitting therein, erred:

#### **I.**

In determining as a conclusion of law that the plaintiff was entitled to the decree of the court adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935 is in all things unconstitutional and void.

## II.

In determining as a conclusion of law that the plaintiff was entitled to the decree of the court

(a) Enjoining and restraining the defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(b) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

## III.

In rendering and entering its final decree

(a) Adjudging and determining that Chapter 390 of the Session Laws of Minnesota of 1935, to be, in all things, unconstitutional and void;

(b) Enjoining and restraining the defendants, and each of them, from making any attempt by legal action, or otherwise, to enforce the provisions of Chapter 390 of the Session Laws of Minnesota of 1935;

(c) Enjoining and restraining said defendants, and each of them, from making any attempt by legal proceedings, or otherwise, to enforce any of the regulations of the Liquor Control Commissioner of the State of Minnesota issued and promulgated under and pursuant to and for the enforcement of Chapter 390 of the Session Laws of Minnesota of 1935;

(d) Enjoining and restraining said defendants, and each of them, from interfering with and from forbidding or preventing in any manner the importation by the plaintiff into the State of Minnesota, and the sale thereof after such importation, of any brand or brands of intoxicating liquors containing more than 25 per cent of alcohol by volume which is ready for sale without further processing, on the ground that said brand or brands have not been registered in the Patent Office of the United States.

#### IV.

In its failure to hold that Chapter 390 of the Laws of Minnesota of 1935 was constitutional.

#### V.

In its failure to dismiss the plaintiff's bill of complaint.

## **SUMMARY OF ARGUMENT.**

### **I.**

#### **COMMERCE CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the commerce clause, Art. I, Sec. 8, Clause 3, of the Constitution of the United States.

Appellants contend that since the enactment of the Twenty-first Amendment the commerce clause does not apply to intoxicating liquors when shipments thereof are made into a state for use or for delivery in such state, and when such shipments are contrary to a law or regulation of the state. If such shipments of intoxicating liquors were merely being transported across or through such state, the commerce clause would still protect them from interference on the part of the state; and if the shipments of intoxicating liquors into a state does not conflict with any of the laws of the state, or if the state has made no laws pertaining to the importation of intoxicating liquors, such shipments would then remain within the protection of the commerce clause.

### **II.**

#### **EQUAL PROTECTION CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the equal protection clause, Article XIV, Section 1, of the Constitution of the United States, because such law is not unreasonably and arbitrarily discriminatory, and because the application and protection of such clause has been removed from the importa-

tion of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

### III.

#### **FREEDOM OF CONTRACT CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the freedom of contract clause, Art. I, Sec. 10, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

### IV.

#### **DUE PROCESS CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention with the due process clause, Art. XIV, Sec. 1, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

## **ARGUMENT.**

The constitutionality of Laws of Minnesota for 1935, Chapter 390, was attacked by the appellee in the court below upon the grounds that said law violated (1) the commerce clause, Art. I, Sec. 8, Clause 3, (2) the equal protection clause, Art. XIV, Sec. 1, (3) the freedom of contract clause, Art. I, Sec. 10 and (4) the due process clause, Art. XIV, Sec. 1.

In its conclusions of law, the lower court determined that Chapter 390 was in all things unconstitutional and void (R. 30). In its opinion, the court reached the conclusion that Chapter 390 was unconstitutional as denying the appellee the equal protection of the laws (R. 16-21). While the lower court confined itself only to the one specification of unconstitutionality, the other grounds are raised by appellee in its Bill in Equity, and for that reason we deem it necessary to discuss each point raised by appellee.

### **I.**

## **COMMERCE CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the commerce clause, Article I, Section 8, Clause 3 of the Constitution of the United States, because the application and protection of such clause has been removed from intoxicating liquors by legislation culminating in the Twenty-first Amendment to the Constitution of the United States.

## **STATEMENT OF APPELLANTS' CONTENTION.**

The commerce clause, Article I, Section 8, Clause 3, provides:

"The Congress shall have power to \* \* \* regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Appellants' position is that since the enactment of the Twenty-first Amendment to the Constitution of the United States the commerce clause does not apply to intoxicating liquors when shipments thereof are made into a state for use or for delivery in such state, and when such shipments are contrary to a law or regulation of the state. If such shipments of intoxicating liquors were merely being transported across or through such state, the commerce clause would still protect them from interference on the part of the state; and if the shipments of intoxicating liquors into a state did not conflict with any of the laws of the state, or if the state had made no laws pertaining to the importation of intoxicating liquors, such shipments would then remain within the protection of the commerce clause.

## **CONSTITUTIONAL AND LEGISLATIVE DEVELOPMENT.**

The primary point to be determined is the right of a state to control and to deal with its own intoxicating liquor problems and, in connection therewith, to prohibit or regulate the importation of intoxicating liquors totally free from any restrictions of the commerce clause of the Constitution of the United States. It must be conceded that by the commerce clause of the constitution, Congress was given complete and exclusive power and authority to regulate the commerce between the several states. It is for us to consider

and determine how far Congress has waived its power in favor of the states, and to what extent such power has been abridged by subsequent constitutional amendments in so far as intoxicating liquors are concerned. To accomplish this purpose it is well to trace the development of the decisions of this court and also the history of federal legislation leading up to the passage of the Twenty-first Amendment, which amendment grants to the states full freedom to regulate the importation of intoxicating liquors therein.

### **The Commerce Clause.**

In *The License Cases*, 46 U. S. 504, arising early in the history of our national government, the Supreme Court of the United States rendered its opinion on statutes of Massachusetts, New Hampshire and Rhode Island involving importations of wines from a foreign country, and also upon a New Hampshire statute relative to gin imported from the State of Massachusetts. The court, speaking through Chief Justice Taney, took the position that while a shipment of intoxicating liquor came within the purview of the commerce clause of the constitution and would, therefore, ordinarily be under the control of the Federal Government, nevertheless, when Congress had not acted and had not assumed any control over the matter, it then remained within the power of the state, in the exercise of its police power, to control the sale of such intoxicating liquor. In sustaining the license laws of the states referred to, the Chief Justice, at page 585, said:

“\* \* \* as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the pol-

icy which the State may suppose to be its interest or duty to pursue."

The court further held that where Congress has acted

"\* \* \* although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorized to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or lessen the revenue of the general government."

and that there is nothing in the Constitution of the United States

"to prevent it (a state) from regulating and restraining the traffic or from prohibiting it altogether, if it thinks proper."

The decision in the License Cases remained the law of this country for forty years. During that period more and more states adopted similar measures for exercising control of the intoxicating liquor traffic and limiting the shipments of intoxicating liquor into the state, and the system of such local state control became widespread.

From the time of the License Cases, *supra*, to the decision in the Bowman case, hereinafter discussed, the court did not seriously interfere with the full control of intoxicating liquor by the states. Between the License Cases and the Bowman case we find the case of *Walling v. Michigan*, 116 U. S. 446. In this case, the court, in passing upon a statute imposing a license tax upon persons soliciting or taking orders from citizens or residents of Michigan for intoxicating liquors to be shipped into that state, and in holding that such statute

was unconstitutional in that it violated the Commerce Clause of the Constitution of the United States, said, at page 458:

"\* \* \* we have no hesitation in saying that the act of 1875, under which the prosecution against Walling was instituted, if it stood alone, without any concurrent law of Michigan imposing a like tax to that which it imposes upon those engaged in selling or soliciting the sale of liquors the produce of that State, would be repugnant to that clause of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several States."

It is apparent that the court did not base its decision in the Walling case as much on the fact that interstate commerce was impeded as it did on the fact that there was discrimination between local products and the products imported into the state. If the Michigan law had required every solicitor to obtain a license whether for the sale of intoxicating liquors produced in Michigan, or for intoxicating liquors imported therein, the court indicates that the statute under consideration would not have been repugnant to the commerce clause.

### **Original Package Doctrine.**

A different view was taken by the court in the cases of *Bowman v. Chicago, etc., Railway Company*, 125 U. S. 507 and *Leisy v. Hardin*, 135 U. S. 100, which cases involved instances where Congress had not acted. In these cases the national character of the transportation of intoxicating liquors in interstate commerce was stressed and it was held that in the absence of any law of Congress granting the right to a state to impose restrictions commerce should be free and unhindered. These two cases involve the shipment of intoxicating liquors in original packages in interstate commerce and develop the original package doctrine. In

1886 the State of Iowa enacted a law forbidding common carriers to bring intoxicating liquors into that state unless they were first furnished with a certificate that the consignee thereof was authorized to sell said liquors. Such law would have been valid under the decision in the License Cases because Congress had never legislated upon the subject and Iowa was simply exercising the police power which had been allowed to the states involved in the License Cases under the decision of Chief Justice Taney. But when this statute came before the court in the Bowman case, the court directly repudiated the doctrine enunciated by Chief Justice Taney in the License Cases and substituted the doctrine, as expressed by Chief Justice Field, at page 507, that

“\* \* \* where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted.”

Very shortly after the decision in the Bowman case another prohibition statute of Iowa came before the court in the Leisy case, *supra*. In the Leisy case the plaintiff invoked the protection of the commerce clause in asserting that the Iowa law authorizing the seizure of intoxicating liquors in original packages shipped in interstate commerce was void. The rule stated in the Bowman case was approved of by the court in the following words, page 108:

"And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health and comfort of persons and the protection of property so situated, yet a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action."

The rule set forth in the Bowman case was further extended in the Leisy case to afford the protection of the commerce clause to the sale of imported liquor, the court saying, at page 124:

"Under our decision in Bowman v. Chicago, etc., Railway Co., supra, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer."

The court points out when such shipments lose their interstate character and become subject to the law of the state.

### **Wilson Act.**

By the use of the words "In the absence of congressional permission to do so" the court expressly pointed out that the right of local control to suppress or control the unrestricted flow of intoxicating liquors which the states desired, should be sought from Congress, and with Chief Justice Fuller's decision in the Leisy case freshly in mind, Congress lost no time in endeavoring to take advantage of the court's suggestion. As a result the so-called Wilson Bill was introduced

on December 4, 1889. As originally introduced this bill unreservedly granted to the states complete power to prohibit, regulate, control, and otherwise govern the transportation of intoxicating liquors into such states from beyond their respective boundaries wholly free from any limitations of the commerce clause, the said bill reading as follows:

"That no state shall be held to be limited or restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or the transportation as an article of commerce or otherwise, to be delivered within its own limits, of any fermented, distilled, or other intoxicating liquids or liquors by reason of the fact that the same have been imported into such State from beyond its limits, whether there shall or shall not have been paid thereon any tax, duty, impost, or excise to the United States." Vol. 21, Cong. Rec., p. 534.

When this Bill was introduced objection was promptly made by Senator Hiscock on the grounds that said bill

"May be invoked by the legislature of a State, not for that purpose but for a purpose of protecting the industries, the distillers, of their own State, the brewers of their own State, the wine-makers of their own State, against those of others \* \* \*." Vol. 21, Cong. Rec., p. 5090.

Senator Hoar, a great constitutional lawyer, replied to this objection (Vol. 21, Cong. Rec., pp. 5090-5091) as follows:

"The senator says that he finds the vice in this bill, that it will leave the States of the Union free to undertake to regulate or control the traffic in intoxicating liquors for the purpose of protecting their own industries against the competition of other States or other nations."

and then proposed the following amendment:

"Provided that such prohibition, regulation, control,

or tax, shall apply equally to all articles of the same character wherever produced."

Senator Graves (Vol. 21, Cong. Rec., p. 5336), Senator Falkner (Vol. 21, Cong. Rec., p. 5378), and Senator Edmonds (Vol. 21, Cong. Rec., p. 5378), proposed numerous amendments to the bill in different language but to the same effect, of limiting the power of the state in the regulation made, so that they would be the same as "affecting or applicable to all other like property." Senator Wilson also proposed an amendment to prevent such discrimination. (Vol. 21, Cong. Rec. p. 5324). It will be noted that the objections made to the Wilson Bill in its original form were practically the same that the court made in the Walling case, *supra*, and that the remedy suggested by Senator Hoar follows the suggestion made by the court in the Walling case. In order to prevent the discrimination referred to the bill in its final form contained express provisions against discrimination and read as follows:

"All fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The effect of the Wilson Act has been the subject of many outstanding decisions in which it has been firmly established that under the provisions of said act, the protection of the commerce clause of the Constitution of the United States

was removed from intoxicating liquors as soon as delivery was made by the carrier to the consignee, and that thereafter such intoxicating liquors came under all of the regulations of the state, provided, however, that such state could not discriminate against such imported intoxicating liquors in any way, but must treat them in the same manner as intoxicating liquors produced within the state.

#### **Decisions under Wilson Act.**

In re Rahrer, 140 U. S. 545,  
 Scott v. Donald, 165 U. S. 58,  
 Vance v. Vandercook Co., 170 U. S. 438,  
 Reymann Brewing Co. v. Brister, 179 U. S. 445,  
 Rhodes v. Iowa, 170 U. S. 412,  
 American Express Company v. Iowa, 196 U. S. 133,  
 Pabst Brewing Company v. Crenshaw, 198 U. S. 17,  
 Delameter v. South Dakota, 205 U. S. 93,  
 Phillips v. City of Mobile, 208 U. S. 472,  
 Adams Express Co. v. Kentucky, 214 U. S. 218,  
 L. & N. R. R. Co. v. Cook Brewing Co., 223 U. S. 70,  
 De Bary & Co. v. Louisiana, 227 U. S. 108.

#### **Effect of Wilson Act.**

We now come to the second group of statutes and cases. It will be noted that the first group limited the freedom of the states by express language against discrimination against out-of-state products. Besides the Wilson Act dealing with intoxicating liquors, we find the Lacey Act relating to the transportation of dead game—Act of Congress, May 25, 1930, C. 533, 31 Stat. 187; Hawes-Cooper Act, 1929, 45 Stat. 1084; Original Oleomargarine Statute, Act of Congress, May 9, 1902, C. 784, Par. 1, 32 Stat. 193. Each of these acts pro-

vides that the article controlled shall be subject to state control "to the same extent and in the same manner" as though the article were produced in the state, thus evidencing the intent on the part of Congress to restrict the freedom of the states to make any discrimination. The effect of the Wilson Act was to remove the protection of the commerce clause of the federal constitution from intoxicating liquors as soon as delivery was made to the consignee. Thereafter such intoxicating liquors came under all of the regulations of the state, provided, however, that the state could not discriminate against such importations in any way, but must treat them in the same manner as all other intoxicating liquors within the state.

The above cited decisions interpreting the Wilson Act disclosed that said Act did not completely prohibit the importation of intoxicating liquors, and unscrupulous persons were afforded an opportunity to evade local liquor regulations. As a result Congress again turned its attention to the problem and enacted the second group of statutes which we will discuss.

### **Acts Subsequent to Wilson Act.**

Group two includes Section 242 of the Criminal Code of March 4, 1909, the Webb-Kenyon Act of 1913, the Reed Amendment of March 3, 1917, and the Collier Act of 1933. This type of legislation is similar to the first group of acts in that it forbids the importation or transportation of certain articles contrary to the laws of the state. However, in these later statutes there is no limitation upon the power of the state to prevent the state from discriminatory action or from dealing with importations as such as distinct from purely intrastate regulations.

### **Webb-Kenyon Act.**

The Webb-Kenyon Act, Senate Bill 4043, as reported out by the Senate Committee, contained a second section in exactly the same wording as the Wilson Act, prohibiting any discrimination by the state and subjecting the imported intoxicating liquors to the control of the state:

"To the same extent and in the same manner as though such liquids or liquors had been produced in such state or Territory." Vol. 49, Cong. Rec., p. 2687.

After an extended debate in Congress upon the question of retaining or striking out this second section 7 and thus prohibiting discrimination by the state, or permitting it, Congress decided to give the state complete self-control of its problems relative to intoxicating liquors and the right to discriminate if it chose to so do, by completely eliminating the second section, and the act was passed in its present form.

The history of the Wilson Act and of the Webb-Kenyon Act affords a striking contrast. The Wilson Act, as originally introduced, contained no clause or reservation preventing discrimination against imported intoxicating liquors, but was amended so as to expressly include such prohibition against discrimination. On the contrary, the Webb-Kenyon Act began its legislative career with all of the prohibitions against discrimination contained in the Wilson Act, but such prohibitions were rejected by Congress, and the Act finally enacted, without such prohibition, even in the face of a presidential veto emphasizing that very point. The elimination of this restriction definitely shows that it was the intent and purpose of Congress to leave the states free to discriminate if they so desired. This intent and pur-

pose is further shown by the arguments of the members of Congress relative to the particular restriction. At page 702 of Vol. 49 of the Congressional Record we find the following remarks made by Senator William E. Borah:

"The prohibition which has been made in the preceding section is, in a sense, abrogated in the second, and liquor is recognized as an article of commerce. Recognizing it as an article of commerce, and one which may go into the state, then the question is, can you stop it and turn it over to the state before it is finally delivered to the consignee? In the first section you make it a contraband of commerce when it is being shipped for unlawful use. In the second you recognize it as an article of commerce, but turn it over to the state before it is delivered to the consignee. I do not think this aids the law in its efficiency, and I believe it is unconstitutional."

In speaking of the effect of the restriction as contained in the original draft, Senator Kenyon, one of the authors of the act, said:

"The first section takes certain liquor out of commerce, and the second section seems to recognize it as being in. There is some incongruity in this." Vol. 49, Cong. Rec., p. 830.

When this act was presented to President Taft for his signature, the President pointed out that the effect of the act was:

"to permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors." Vol. 49, Cong. Rec., p. 4292.

and vetoed it. In his veto message, Vol. 49, Cong. Rec., p. 4296, President Taft quotes from the opinion of Attorney General Wickersham as follows:

"The proposition \* \* \* can only be conceded if it be held that Congress can abdicate entirely its power over interstate commerce in an article which it does not itself declare to be 'an outlaw of commerce,' but which it leaves to the varying legislation of the respective states to more or less endow with qualities of out-lawry. Without prolonging this discussion \* \* \* I am compelled to the conclusion that unless the Supreme Court shall recede from a well-settled line of decisions extending over a long period of years it would most certainly declare this legislation to be without the constitutional powers of Congress."

The Act was, however, declared to be constitutional in the case of *James Clark Distilling Company v. Western Maryland Railway Co.*, 242 U. S. 320.

#### **Decisions Under Webb-Kenyon Act.**

The Webb-Kenyon Act is the congressional prototype of the Twenty-first Amendment, and the decisions of the courts in construing and applying it are particularly apt in the present case. Probably the leading and most widely cited of these cases is that of

#### **CLARK DISTILLING COMPANY v. WESTERN MARYLAND RAILWAY CO., 242 U. S. 320.**

This case involved an action brought by the plaintiff to compel the defendant to accept shipments of intoxicating liquor destined for the State of West Virginia. The statutes of West Virginia prohibited the manufacture, sale, keeping or storing for sale of intoxicating liquor except by druggists for medicinal, sacramental, scientific, and manufacturing purposes; but there was no express prohibition against the individual right to use intoxicants. The statute further

provided that every delivery of intoxicating liquor in the state by a common carrier should be considered as a consummation of a sale made at the point of delivery in the state. After stating that there can be no question that this statute did not offend the due process clause of the Fourteenth Amendment, the court, at page 320, said:

"But that it was a direct burden upon interstate commerce and conflicted with the power of Congress to regulate commerce among the several states, and therefore could not be used to prevent interstate shipments from Maryland into West Virginia, has not been open to question since the decision in *Leisy v. Hardin*, 135 U. S. 100. And this brings us to consider whether the Webb-Kenyon Law has so regulated interstate commerce as to give the State the power to do what it did in enacting the prohibition law and cause its provisions to be applicable to shipments of intoxicants in interstate commerce, thus saving that law from repugnancy to the Constitution of the United States, \* \* \*"

Replying to the contention that the Webb-Kenyon Act was only intended to include state prohibitions in so far as they forbade the shipment, receipt and possession of liquor for a forbidden use, the court, at page 323, stated:

"The antecedents of the Webb-Kenyon Act, that is, its legislative and judicial progenitors, leave no room for the contention made. To correct the great evil which was asserted to arise from the right to ship liquor into a State through the channels of interstate commerce and there receive and sell the same in the original package in violation of state prohibitions, was indisputably the purpose which led to the enactment of the Wilson Law forbidding the sale of liquor in a State in the original package even although brought in through interstate commerce when the existing or future state laws forbade sales of intoxicants. \* \* \* At the same

time it was recognized, however, that as the right to receive liquor was not affected by the Wilson Act, such receipt and the possession following from it and the resulting right to use remained protected by the commerce clause even in a State where what is known as the dispensary system prevailed. *Vance v. Vandercook Company*, 170 U. S. 438. Reading the Webb-Kenyon Law in the light thus thrown upon it by the Wilson Act and the decisions of this court which sustained and applied it, there is no room for doubt that it was enacted simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling irrespective of whether the State law did or did not prohibit the individual use of liquor. That such also was the embodied spirit of the Webb-Kenyon Act plainly appears since if that be not true, the coming into being of the act is wholly inexplicable."

In passing upon the case of *Adams Express Co. v. Kentucky*, 238 U. S. 190, an earlier decision interpreting the Webb-Kenyon Act, the court said, at page 325:

"But we see no grounds for following the rulings thus made since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate

commerce away from all receipt and possession of liquor prohibited by state law."

**SEABOARD AIRLINE RY. v. NORTH CAROLINA, 245 U. S. 298.**

This case reiterates the language of the Clark case. An act of North Carolina required railroad companies to keep a separate book in which the name of every person to whom intoxicating liquor was shipped was to be entered. The statute further provided that the record was to be open for inspection by any officer or citizen. This statute did not prohibit, but did restrict, the use of and traffic in intoxicating liquors. The railroad company was prosecuted for an alleged violation of the act. It defended on the grounds that it could not comply with the statutes without violating the commerce clause of the constitution. The court held that a shipment from without the state was not free from this restriction because of the commerce clause, as the Webb-Kenyon Act had removed that protection.

**MCCORMICK & CO. v. BROWN, 286 U. S. 131.**

In this case, decided in 1932, the court held that the Webb-Kenyon Act was still in force despite the Eighteenth Amendment and the National Prohibition Act. In this case, the court sustained a West Virginia statute restricting, but not prohibiting, the liquor traffic, and requiring nonresidents to take out a permit at an annual fee of fifty dollars before selling or furnishing any intoxicating liquor to any place in the state. If any doubt remained as to the extent of the application of the Webb-Kenyon Act in removing the protection of the commerce clause from interstate intoxicating liquor shipments, it was removed by the opinion of the court in this case. At page 143, the court said:

"The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the State into which the shipment is made \* \* \*. The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their products only to licensed dealers in West Virginia, \* \* \*.

The short answer is that the state law does not make permits issued to local dealers a substitute for the permits required of wholesale dealers. If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the state law within the meaning of the Webb-Kenyon Act."

### **'Eighteenth Amendment.**

We next come to the Eighteenth Amendment to the Constitution of the United States and cases thereunder. The amendment reads as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

Under this amendment the individual states retained their own power and their authority was not confined to intra-state commerce only.

## Decisions Under Eighteenth Amendment.

### NATIONAL PROHIBITION CASES, 253 U. S. 350.

In passing upon the meaning of Section 2 of the Eighteenth Amendment the court stated, at page 387:

"The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."

### UNITED STATES v. LANZA, 260 U. S. 377.

This case involved the prosecution of a liquor law of the United States. The defendant pleaded a former conviction under the liquor laws of the State of Washington. The court held that the Eighteenth Amendment freed the individual states from all restrictions upon the state's powers placed thereupon by the federal constitution, in the following words by Chief Justice Taft, who, it will be recalled, vetoed the Webb-Kenyon Act when he was President, at page 381:

"In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. \* \* \* Such laws derive their force, as do all new ones consistent with it, not from this Amendment, but from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore, arising out of the Federal Constitution. This is the

ratio decidendi of our decision in *Vigliotti v. Pennsylvania*, 258 U. S. 403."

This decision was quoted with approval in *McCormick & Company, Inc. et al. v. Brown, Commissioner, et al.*, 286 U. S. 131. In *Corneli v. Moore*, 257 U. S. 491, the court refused to uphold the contention that the power of Congress under the Eighteenth Amendment was restricted by the Fifth Amendment.

### **Collier Act.**

In 1933, Congress passed what is known as the Collier Act, (Act of Congress of March 22, 1933, c. 4, 48 Stat. 17, 27 U. S. C. A., Sec. 64 j) which act specifically divested beer, ale, porter, wine, similar fermented malt or vinous liquor and fruit juice containing 3.2 per cent or less of alcohol by weight of their interstate character in certain cases and prohibited their shipment or transportation in violation of state law.

### **Twenty-first Amendment.**

Such was the condition of the law immediately previous to the adoption of the Twenty-first Amendment to the Constitution of the United States. That amendment effectually restores to the states the same power with respect to the transportation and importation of intoxicating liquors which they enjoyed prior to the constitution. In other words the Twenty-first Amendment, in so far as intoxicating liquors are concerned, abrogated the commerce clause of the constitution of the United States and, as was said by Chief Justice Taft in the *Lanza* case, the states may now act in pursuance of the guaranty of the Tenth Amendment which amendment states that:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The purport of this amendment is expressed by the Supreme Court in *Gordon v. United States*, 117 U. S. 697 in the following words, at page 705:

"The reservation to the States respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument."

We also find the following statement in *Buffington v. Day*, 11 Wall. (U. S.) 113:

"In respect to the reserved powers, the state is as sovereign and independent as the general government."

Prior to the adoption of the Federal Constitution the states were sovereign in the full absolute sense of the term and repeatedly enacted laws controlling, regulating and prohibiting importations. *Spooner v. McConnell*, 22 Fed. Cas. No. 13, 245; *Ex parte Guerra*, 94 Vt. 1, 110 Atl. 224; *American Coal Min. Co. v. Indiana Special Coal. etc. Com.*, 268 Fed. 563, 258 U. S. 632; *Thurlon v. Massachusetts*, 5 How. (U. S.) 504-587.

The proposal to repeal the Eighteenth Amendment, terminating in the adoption of the Twenty-first Amendment to the federal constitution, as originally proposed in Senate Joint Resolution 211 in December, 1932, contained a specific proposal to remove the protection of the interstate commerce clause from intoxicating liquors only when the same was transported or imported into a state prohibiting the same. The proposal read: 3

"Section 1. The provisions of clause 3 of Section 8 of Article I of the Constitution \* \* \* shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any state \* \* \* for use therein of intoxicating liquors for beverage or other purposes within the state or territory if the laws in force therein prohibit such transportation or importation; \* \* \*." (Vol. 76, Cong. Rec., p. 65).

On January 9, 1933, the Senate Judiciary Committee presented its report on this Resolution, and recommended as a complete substitute therefor the Amendment in its present form, with the addition of an added section, which section was subsequently removed. (Vol. 76, Cong. Rec., p. 1621). In discussing the recommendation of the Judiciary Committee, Senator Blaine, who was representing the Committee, stated:

"First, however, we had what is known as the Wilson Law. That law was treated in the case of *Rhodes v. Iowa*, 170 U. S. 412; but the Supreme Court in that case gave rather a restricted construction of the language used by Congress, and held that under the Wilson Act the interstate character attached to the liquor until it had actually been delivered to the consignee \* \* \*

"The Webb-Kenyon Act was interpreted by the Supreme Court of the United States in the case of *Clark Distilling Company v. Western Maryland Railway*, 242 U. S. 311. The language of the Webb-Kenyon Act was designed to give the states in effect power of regulation over intoxicating liquor from the time it actually entered the confines of the state; and the Supreme Court held that it was following the doctrine laid down in the case of *Rhodes v. Iowa*, and necessarily must follow that doctrine in order to sustain the decision it was

making in the case of Clark against Maryland Railroad Company \* \* \*

"In the case of Clark against Maryland Railway Company there was a divided opinion. There has been a divided opinion in respect to the earlier cases, and that division of opinion seems to have come down to a very late day. So, to assure the so-called dry states against the importation of intoxicating liquor into those states, it is proposed to write permanently into the Constitution a prohibition along that line" (Vol. 76, Cong. Rec. pp. 4140-4141).

Again referring to the second section of the Amendment, Senator Blaine said:

"\* \* \* The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States \* \* \*."

Senator Borah, a recognized authority on constitutional law, speaking on the proposed amendment before the Senate, stated:

"Mr. President, I wanted to say that this question of the right of the States, in the exercise of the police powers to control the liquor traffic within the States, was fairly and squarely presented in many cases to the Supreme Court, always a portion of the court contending that the police power should be permitted to be exercised by the States to the full extent within the boundaries of the States. \* \* \* The people had declared they wanted to be rid of this evil, or at least to control it in their own way. These States were invaded, their laws broken, their officials corrupted, by the same influences which now plead for State's rights and local control. They did not at that time respect that right at all. They trampled upon it and scoffed at it. Therefore, if we are to have what we are now promised, local

self-government, State rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment." (Vol. 76, Cong. Rec., p. 4172).

In order that there might be no question but that the protection to be afforded by Congress in the removal of the interstate commerce provision should be extended only to the dry states, Senator Glass offered as an amendment a substitute containing the following language:

"The sale of intoxicating liquors within the United States \* \* \* for consumption at the place of sale, and the transportation of intoxicating liquors into any State \* \* \* in which the manufacture, sale, and transportation of intoxicating liquors are prohibited by law, are hereby prohibited \* \* \*." (Vol. 76, Cong. Rec., p. 4211).

In explaining his amendment, Senator Glass said (p. 4219):

"\* \* \* In my own interpretation of the resolution as I have presented it, there can be no consignee of intoxicating liquors in a dry state. Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but the resolution \* \* \* prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale or transportation of liquors. So I have met the objection that we are undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors; \* \* \*."

The amendment was defeated.

It can readily be seen that Congress had squarely before it the question of whether or not the proposed amendment should remove the protection of interstate commerce from

the shipment of liquors into all States contrary to their laws, or simply into States which are dry. That there was no question in the mind of Congress as to the meaning of the provision is shown by the language of Senator Robinson as follows:

"The language of section 2 is perfectly plain. \* \* \* That leaves to the State the power of regulation; it places the moral force of the government of the United States behind the State in the enforcement of their laws; \* \* \*" (Vol. 76, Cong. Rec., p. 4225).

In the House of Representatives, Representative McSwain (p. 4522) stated:

"The proposed amendment to the Constitution is, in effect, a proposal to repeal the Eighteenth Amendment, but also to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever."

Section 2 of the Twenty-first Amendment as finally proposed by Congress to the States on February 20, 1933, and as ratified by the required number of states and in force December 5, 1933, was in the exact language as reported out by the Senate Judiciary Committee and reads:

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

### **Decisions Under Twenty-first Amendment.**

The extent to which the Twenty-first Amendment has removed intoxicating liquors from the protection of the commerce clause has been passed on by a number of district courts and by this court.

PREMIER-PABST SALES CORPORATION v.  
GROSSCUP, 12 Fed. Supp. 970.

In this case, the District Court for the Eastern District of Pennsylvania had under consideration a statute of that state which discriminated between distributors of beer made within the state and distributors of imported beer. Plaintiff raised the objections that the statute was in violation of 1. The commerce clause of the Constitution of the United States, and 2. The Fourteenth Amendment to the Constitution of the United States. After briefly discussing the various laws and decisions leading up to and including the Twenty-first Amendment, the court states, at pages 971, 972:

"As the law now is, the measure of control which the states may exercise is determined by the states themselves. If the importation of intoxicating liquor is acceptable to a state, it retains its status as the legitimate subject of interstate commerce, but if it is forbidden importation by the state, the laws of the United States likewise forbid it. Interstate commerce is spoken of under the figure of a stream whose free flow cannot be interrupted by any state law. Any state may, however, remove intoxicating liquor as a subject of interstate commerce. When it does so by passing a law on the subject of its importation, the law of the United States forbids its further importation if in violation of the laws of the state."

Restating itself, the court, at page 972, further says:

"Under the Twenty-first Amendment when a state passes a law upon the subject of the importation of intoxicating liquors all importation in violation of that law is forbidden by the Constitution and laws of the United States."

The decision of the lower court was appealed to the Supreme Court where it was affirmed, 298 U. S. 226, but that

court refused to pass on the constitutional questions involved, and based its affirmance upon the fact "that the plaintiff is without standing to present it" (p. 227).

**GENERAL SALES & LIQUOR CO. v. BECKER, 14  
Fed. Supp. 348.**

The Liquor Control Act of Missouri, Laws of Missouri 1935, p. 273, provided that a nonresident could not lawfully solicit, receive or take orders for the sale of intoxicating liquors in the State of Missouri except by or through a duly licensed wholesale liquor dealer. The statute further provided that no intoxicating liquors could be imported into the state for sale or storage therein unless ordered by a licensed wholesale dealer. The act also provided that a nonresident must pay the same annual license fee as a resident wholesale dealer. Plaintiff was a nonresident dealer in intoxicating liquors holding a Missouri license. The contention was made by plaintiff that to require it to pay the same license fee as a resident wholesale dealer and then to prohibit it from selling to a retail dealer on the same basis as a resident wholesale dealer placed a burden on interstate commerce and deprived plaintiff of the equal protection of the law. After discussing the Webb-Kenyon Act and the Twenty-first Amendment relative to the commerce clause, the court said, at page 350:

"The amendment does recognize the authority of the state to regulate the movement of liquor into the state, and where availed of, as in this case, the importation of intoxicating liquors in violation of local law is outside the commerce clause."

**PACIFIC FRUIT & PRODUCE CO. v. MARTIN, 16  
Fed. Supp. 34.**

In this case the District Court of Washington had under

its consideration a Washington statute which required a non-resident wholesale dealer in intoxicating liquors to obtain a license to sell beer in the state. The court held that such requirement violated the commerce clause, the equal protection clause and the due process clause of the Constitution of the United States. The court followed the opinions of the courts in *Joseph Triner Corporation v. Arundel*, 11 Fed. Supp. 145, the present case now on appeal, and *Young's Market Co. v. State Board of Equalization*, 12 Fed. Supp. 140, which case was reversed on appeal, *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59. The court stated its interpretation of the law in the following language, at pages 39, 40:

"While it may be conceded that the intent of the Wilson Act, 26 Stat. 313 (27 U. S. C. A., Sec. 121), the Webb-Kenyon Act, 37 Stat. 699, 49 Stat. 877 (27 U. S. C. A., Sec. 122), the Act of March 22, 1933, 48 Stat. 19, Sec. 6, referred to in defendants' brief as the 'Collier Act,' repealed and in part reenacted, 49 Stat. 877, Sec. 202, subdivision (a), and subdivision (b), 27 U. S. C. A., Sec. 122, and the Twenty-first Amendment, was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over intoxicating liquors produced in the state into which they were brought, yet, none of them show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another."

The doctrine of this case has been repudiated by subsequent decisions hereinafter set forth.

DUGAN v. BRIDGES, 16 Fed. Supp. 694.

A statute of New Hampshire, Laws of 1933, Chapter 99, as amended by Laws of 1935, Chapter 152, provided that no

wholesaler of intoxicating liquors could purchase any beverages from any manufacturers who did not have a permit as required by law, and import such beverages into New Hampshire for the purpose of sale, unless the manufacturer from whom the purchase was made had obtained a certificate of approval from the New Hampshire State Liquor Commission, the certificate costing five hundred dollars annually. The court discusses in great detail the history of the development of legislation leading up to the Twenty-first Amendment. The court stated, at page 705, after reviewing the Webb-Kenyon Act:

"In view of the legislation above mentioned, it cannot be claimed that the New Hampshire act of which complaint is made imposes an undue burden upon interstate commerce and for that reason is unconstitutional."

The court later discusses the Twenty-first Amendment, and after quoting Section 2 thereof says, at page 706:

"There seems to have been no authoritative ruling by the Supreme Court as to the effect of section 2 of the section above quoted. Its language so closely follows the Webb-Kenyon Act as to lead us to the conclusion that it was copied therefrom and that it should receive the same construction as that given the last-mentioned act."

PHILIP BLUM & CO. v. HENRY (Wisc. March 28, 1936).

This case apparently has not been reported.

A Wisconsin statute required non-resident dealers in intoxicating liquors to pay an annual license fee to sell such liquors in that state. Sales by non-resident dealers were limited to manufacturers or wholesalers. For the same license fee, residents of Wisconsin were permitted to sell to retailers as well as to manufacturing and wholesalers. The

Wisconsin statute, it will be noted, was very similar to the Missouri statute above referred to.

The District Court for the Eastern District of Wisconsin, after discussing the intent of the Twenty-first Amendment, stated:

"The query is at once prompted, can it be possible that the language of the Amendment may be so ignored that Congress may still regulate interstate commerce—in intoxicating liquor,—by authorizing transportation into any state, notwithstanding interdiction by the state? Or that it must be held, notwithstanding the amendment, that the right to transport intoxicating liquors into any state is guaranteed by other articles of the National Constitution as a 'privilege or immunity,' of a citizen of the United States; or to 'citizens of the several states; or as a guaranteed protection of equal laws? We regard these contentions as repugnant to the plain words of the articles."

STATE BOARD OF EQUALIZATION OF CALIFORNIA v. YOUNG'S MARKET CO., 299 U. S. 59.

This case is the first and, at the time of writing this brief, the only decision by this court interpreting the Twenty-first Amendment. The statute of California imposed a license fee of five hundred dollars for the privilege of importing beer to any place within the borders of the state, but did not grant the right of selling the beer so imported within the state. In discussing the contention of the plaintiffs that the requirement of a license fee for the importation of beer violates the commerce clause, the court said, at page 62:

"What the plaintiffs complain of is the refusal to let them import beer without paying for the privilege of importation. Prior to the Twenty-first Amendment it

would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination; but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide. \* \* \*

"The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions it prescribes."

**WYLIE ET AL v. STATE BOARD OF EQUALIZATION et al., 21 Fed. Supp. 604.**

This case involved a California statute prohibiting the importation of intoxicating liquors into that state without first having obtained an importer's license. One of the grounds of attack was that the statute violated the commerce clause. In answer to this contention, the court stated, at page 605:

"The power of the states to control the traffic in liquor, under the Twenty-first Amendment, has been but recently declared to be absolute, in a case arising in California. There the Supreme Court held that the power is not limited by the commerce clause of the Constitution. (State Board of Equalization v. Young's Market Company (1936) 299 U. S. 59)."

**ZUKAITIS v. FITZGERALD, 18 Fed. Supp. 1000.**

In this case plaintiffs attacked the validity of a section of the Michigan Liquor Control Act, Public Acts Mich. 1933, Ex. Sess., No. 8, Sec. 40, in so far as it provided for an inspection fee of twenty-five cents a barrel to be paid by non-resident manufacturers of beer; and of the rules and regu-

lations of the Michigan Liquor Control Commission requiring 1. That all non-resident breweries obtain a seller's contract, and 2. That wholesale distributors of beer should be limited to handling the products of not more than two resident breweries, and not more than one non-resident brewery.

After discussing plaintiffs' objections and defendants' arguments, the court stated, at page 1004:

"It is apparent that the statute and regulations complained of impose discriminatory burdens upon out-state liquor, but we are not convinced that such discriminations are so wholly unrelated to the powers now returned to the states by the Twenty-first Amendment to regulate or forbid the importation of liquors into Michigan that we can say with that clearness which is imperative that such rules and regulations are unconstitutional. This view is confirmed by the decision of the United States Supreme Court, in the case of State Board of Equalization of California et al. v. Young's Market Company et al. (November 9, 1936) 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. .... In that case, a construction was placed upon the Twenty-first Amendment which clearly recognized the right of the states to forbid entirely transportation and importation of liquor, to impose heavy importation fees and to exact importer's license fees. The Supreme Court in that case refused to construe the amendment in such manner as to limit these rights to those states which prohibit manufacture and sale of liquor within their borders."

FINCH & CO. v. McKITTRICK, Mo. Feb. 24, 1938.

This case was heard by the United States District Court for Missouri and has not been reported.

A Missouri statute, Laws of 1937, H. B. No. 331, prohibited the sale within the State of Missouri of intoxicating liquors manufactured in such other states as have laws dis-

criminating against intoxicating liquors manufactured in Missouri. The plaintiffs raised the objection that said law violated both the Commerce Clause and the Equal Protection Clause of the Constitution.

After discussing the case of *State Board of Equalization of California v. Young's Market Co.*, supra, the District Court said:

"By reason of this opinion it must now be said that the implied prohibition upon state legislation arising from the 'commerce clause' no longer exists, in so far as intoxicating liquors are concerned. So far as that one commodity is concerned the nation again is in that same situation in which it was as to all commerce before the adoption of the Constitution."

The court held that the commerce clause was not violated.

## II.

### **EQUAL PROTECTION CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the equal protection clause, Article XIV, Section 1, of the Constitution of the United States, because such law is not unreasonably and arbitrarily discriminatory, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

A. Chapter 390 is not unreasonably and arbitrarily discriminatory.

**General principles of equal protection clause.**

Article XIV, Section 1 of the Constitution of the United States provides that no state shall:

“deny to any person within its jurisdiction the equal protection of the law.”

This constitutional provision is not violated if “the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.” *Duncan v. Missouri*, 152 U. S. 377. The following statement is found in Black on Constitutional law (4th Ed.) page 567:

“The ‘equal protection of the laws’ means the protection of equal laws, and requires every state to give equal protection and security to all under like circumstances, the object being to prevent arbitrary and invidious discriminations and class legislation not founded on legal and reasonable grounds of distinction.”

Legislation objectionable as being in violation of the equal protection clause is that which makes improper distinctions and discriminations by conferring privileges on a class arbitrarily selected from large numbers of persons who stand in the same relation to the privilege in question, there being no substantial reason for making such distinction. Where the statute applies equally and alike upon those actually or properly within the same class, the statute cannot be called class legislation. *Missouri Railway Co. v. Mackey*, 127 U. S. 205.

A more complete statement of the purposes and limitations of the equal protection clause is found in the case of *Barbier v. Connolly*, 113 U. S. 28. That case involved a

municipal ordinance prohibiting washing and ironing in public laundries and wash-houses within certain territorial limits between certain hours. The court, at page 31, said:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; \* \* \* that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, \* \* \*. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. \* \* \* Class legislation, discrimination against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

### **Scope of Police Power.**

The equal protection clause does not prevent the state from making classification under its police powers, but permits wide discretion in that regard. It is only those laws

that are without reasonable basis and purely arbitrary that violate such clause.

The earlier decisions of this court quite generally limited the exercise by the state of its police powers to matters affecting the public health, public morals and public safety, but during the past half century this limitation has been abandoned and the court has enlarged by judicial interpretation the scope of this power to meet the requirements of changing economic and industrial conditions. It is now the consensus of judicial opinion that the state may exercise its police power not only for the promotion and protection of the public health, public morals and public safety, but also to promote the wealth and prosperity, the comfort, convenience, and happiness, in short, the general welfare of the people of the state.

Black on Constitutional Law (4th Ed.), page 366.

Barbier v. Connolly, 113 U. S. 27.

Mugler v. Kansas, 123 U. S. 623.

Camfield v. United States, 167 U. S. 518.

C. B. & Q. Ry. Co. v. People, 200 U. S. 561.

Sligh v. Kirkwood, 237 U. S. 52.

In *Sligh v. Kirkwood*, supra, at page 58, the court stated:

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. *New York v. Miln*, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legisla-

tion and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27. It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. *Camfield v. U. S.* 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago, etc. Ry. v. Drainage Commissioners*, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity. \* \* \* And further, "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government." *Eubank v. Richmond*, 226 U. S. 137, 142.

In *Barbier v. Connolly*, *supra*, at page 31, the court said:

"Neither the amendment (referring to the Fourteenth)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

#### **Rules relative to validity.**

In the case of *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, this court laid down four rules relative to the

validity of a state statute under the Fourteenth Amendment. These rules are found at page 78, and are:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

#### **Discussion of Chapter 390.**

The lower court, *Triner v. Mahoney*, 20 Fed. Supp. 1019, at page 1020, points out that Laws of Minnesota for 1935, Chapter 390 is discriminatory as follow:

"The Minnesota statute discriminates between wholesalers who handle imported brands of liquor which are not registered in the Patent Office and those who handle imported brands of liquor which are registered in the Patent Office. It discriminates between those who import liquor requiring further processing in Minnesota and those importing liquor which does not require further processing in Minnesota. Imported liquor requiring further processing in the State may be sold in the State whether the brand is registered or not, whereas the same kind and quality of liquor, if it is imported into the State ready for sale, can only be sold provided the

brand is registered. Those who sell only liquor manufactured in Minnesota are not affected by the law, while those who import liquor of equal goodness may not sell it in the State unless it bears a registered brand."

The discriminations objected to by the court may be restated to be:

1. Between wholesalers who handle imported brands of liquor which are not registered in the patent office and wholesalers who handle imported brands of liquor which are registered in the patent office.

2. Between wholesalers who import liquors that require further processing and those that import liquors that do not require further processing.

3. Between wholesalers who only sell liquors manufactured in Minnesota and wholesalers who sell liquors imported into the state.

Appellants contend that Chapter 390 does not in any manner discriminate between persons holding the same type of licenses. Each licensee has the same rights and privileges as other licensees of the same class. The discrimination made by the legislature is between the types of intoxicating liquors imported into this state. Intoxicating liquors imported in a ready to sell condition must have their brand names registered in the patent office of the United States. Intoxicating liquors imported in such condition as to require further processing before it is ready for sale may be brought in without having their brand names registered. This distinction does not in any manner affect the rights of the appellee, or others similarly situated, since under their manufacturer's or wholesaler's license they, in common with all other holders of similar licenses, may import liquors in bulk, process the same and sell them under the names of unregis-

tered brands. They, in common with all other licensees, may import liquors ready for sale under brand names which are registered in the patent office of the United States, and they, in common with other licensees, are prohibited from importing liquors under brand names not so registered. It cannot be said that the statute under consideration discriminates against appellee to the advantage of others holding the same class of license. All are on the same level, subject to the same restrictions and the recipients of the same privileges. All licensees holding a manufacturer's or wholesaler's license are equally affected by the terms of Chapter 390. No distinction is made by the terms of the law between various manufacturers and wholesalers within the general class. That some may incidentally suffer more than others through the working of the law does not make the law invalid as being class or special legislation. By virtue of holding manufacturer's licenses, either plaintiff or both may manufacture, ferment, brew, distill, refine, rectify, blend, prepare and produce intoxicating liquors in this state. Section 1, Chapter 46, Extra Session Laws of Minnesota for 1933-34. And in connection therewith they may import intoxicating liquors in bulk, process the same and sell under brand names not registered in the patent office of the United States. In this respect they are on the same basis as those manufacturers now situated in this state who are processing liquors.

The objection that the law purports to discriminate between licensees who handle imported brands of intoxicating liquors which are not registered in the patent office of the United States and licensees who handle imported brands that are registered is of no significance. The obvious answer is that licensees who import unregistered brands should have the brands registered. The fact that due to the mechanics

of the federal government such registration requires a considerable period of time and the expenditure of money is not to be considered an element making the Minnesota law arbitrary and unreasonable. Neither is the fact that certain brand names cannot be registered important. In the case of *State Board of Equalization of California v. Young's Market Co.*, supra, this court held that a state may establish a monopoly of the manufacture and sale of beer and channelize importations by confining them to a single consignee. The court further held that a state could permit the importation of beer and forbid the importation of other liquors. Surely if a state has those powers, it has the right to enact a law prohibiting the importation of liquors ready for sale unless the brand names thereof are registered. The law does not preclude licensees from importing intoxicating liquors. It merely imposes conditions under which such liquors can be brought into this state.

Under the Webb-Kenyon Act and the Twenty-first Amendment, the appellee does not have an absolute right to import intoxicating liquors into this state. His right of importation is determined by the state law. The state, if it so desired, could prohibit all importations of intoxicating liquors. If it permits importations, it may determine under what conditions such liquors may be imported.

Broadly speaking, the power to determine what regulations are necessary to regulate the traffic in intoxicating liquors rests in the legislature of the state enacting the law. This principle has been universally recognized by our courts and is stated by the Supreme Court of the United States in *Mugler v. Kansas*, 123 U. S. 623, in the following language, at page 661:

"It belongs to that department to exert what are known as the police powers of the State, and to determine,

primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety."

A Pennsylvania statute made it unlawful for unnaturalized foreign born residents to kill wild game except in defense of person or property and to that end made the possession by such persons of shot guns and rifles unlawful. The court, in *Patsone v. Pennsylvania*, 232 U. S. 138, held that the law was not unconstitutional under the Fourteenth Amendment. We quote excerpts from Justice Holmes' opinion, at page 144:

"The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class.

"The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. *Barrett v. Indiana*, 229 U. S. 26, 29.

"Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. *Adams v. Milwaukee*, 228 U. S. 572, 583. If we might trust popular speech in some States it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong. See *Trageser v. Gray*, 73 Maryland, 250. *Commonwealth v. Hana*, 195 Massachusetts, 262."

Chapter 390 is far more justified in respect to the test applied in this case than was the Pennsylvania statute. The dangers against which that state was legislating were not apparent except to those having local knowledge of the situation. Using this test without anything further, Chapter 390 must be declared constitutional against the particular objection made. However, it is common knowledge that there are dangers in the traffic in alcohol that are inherent to the traffic, and that such traffic has long been subjected to legislative and constitutional control.

The case of *Adams v. Milwaukee*, 228 U. S. 572, involved a Milwaukee ordinance which provided a different regulation for vendors of milk drawn from cows outside of the City of Milwaukee than was applied to vendors of milk drawn from cows within the city. Plaintiff contended that the ordinance violated the Fourteenth Amendment because it did not affect all persons alike. In passing upon this particular point, the court said, at page 579:

"If we regard the territorial distinction merely, that is, milk from cows outside and milk from cows within the city, there is certainly no discrimination. All producers outside of the city are treated alike."

The Supreme Court of Wisconsin, in holding the ordinance to be constitutional, held that inspection of the animals producing the milk could not be made outside of the city and consequently there was sufficient basis for the ordinance which required that the containers of milk shipped into Milwaukee bear the name and address of the owner and that the owner file a certificate of a licensed veterinary to the effect that his cows have been found free from tuberculosis.

In passing upon an Iowa statute relating to the liability of railroad corporations for damages sustained by the wilful acts of employes thereof, the court in *Chicago, Burlington and Quincy Railroad Company v. McGuire*, 219 U. S. 549, said, at page 569:

"The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

*PRICE v. ILLINOIS*, 238 U. S. 446.

This case involved the sale of a preservative compound contrary to the Illinois Pure Food Law. Plaintiff urged that he was discriminated against. The court remarked, at page 453:

"The legislature is entitled to estimate degrees of evil and to adjust its legislation according to the exigency found to exist."

Chapter 390 was enacted by the legislature of the State of Minnesota as a regulatory measure by virtue of its police powers over the importation of intoxicating liquors. It had a definite purpose in mind, that of protecting the public from spurious brands of intoxicating liquors manufactured outside of the limits of the state. Liquors manufactured or processed in this state can be directly supervised and inspected by local officials. Liquors manufactured outside of the state cannot be. While the registration of the brand

name does not depend upon quality or purity of the product, the registration does fix ownership of the brand and the responsibility of the products sold under such brand. Such law also prevents duplicate brands or brands of similar names from being registered. The fact that Chapter 390 is not the best kind of law to accomplish its purpose is not material. It may be that the Rules and Regulations of the Liquor Control Commissioner as set forth in appellee's Bill of Complaint afford greater protection to the consuming public of this state. The court cannot inquire into that matter. The fact is that the legislature enacted what it deemed the most desirable and best for the welfare of the people of this state. We may differ with the legislature, but our difference of opinion is not sufficient reason to declare the law void.

A pertinent statement is found in *General Sales & Liquor Co. v. Becker*, *supra*, at pages 350, 351:

"No principle is better settled than that the state in the exercise of its police powers, in doing what it conceives to be necessary to promote public morals, the public health, and the public safety, may prohibit the manufacture and sale of intoxicating liquor, or may regulate and supervise the manufacture and sale of such liquors in such manner as it conceives to be necessary and proper. *Mugler v. Kansas*, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6, 32 L. Ed. 346. In so legislating it may be that private property is destroyed, that some class of individuals are prohibited from or restricted in engaging in the business of selling liquors, but this has never been construed as being prevented by the Fourteenth Amendment.

"The necessity for the full exercise of its authority by the state was never greater than it is at this time.

\* \* \* The situation does call for the strictest regula-

tion of the business by all of our governmental agencies, national and state."

The objection that Chapter 390 discriminates in favor of intoxicating liquors manufactured or processed in Minnesota is not tenable.

In *Cox v. Texas*, 202 U. S. 446, in discussing a statute of the State of Texas, which provided for taxes on sellers of spiritous, vinous, or malt liquors and required an application for a license to be accompanied by a bond, and containing a provision that the same should not apply to wine produced from grapes grown within the state, the court recognized the discrimination and said, at page 450:

"It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. But to that extent alone, favor is shown to a class."

Replying to the contention that such discrimination was in violation of the Fourteenth Amendment, the court said, at page 451:

"\* \* \* If the States were restricted by the 14th Amendment only, and saw fit to encourage domestic production, or sought to promote temperance, or to help to secure pure wine, by statutes such as those before us, there would be nothing to hinder them."

Also see *State v. Parker Distilling Co.*, 236 Mo. 219, 139 S. W. 453. Intoxicating liquors do not come within the protection of the fourteenth amendment, and the right to possess, make, or deal in such liquors is not a privilege or immunity of citizens of the United States, and, therefore, state legislation prohibiting the importation of intoxicating liquor

or restricting or regulating its manufacture, possession, use, importation, or handling, does not violate the Fourteenth Amendment. *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 16, *Crowley v. Christensen*, 137 U. S. 91; *Barbau v. Georgia*, 249 U. S. 454; *Samuels v. McCurdy*, 267 U. S. 188; *Gray v. Conn.*, 159 U. S. 777; *Clark Distilling Company v. Western Maryland Ry. Co.*, 242 U. S. 311; *Crane v. Campbell*, 245 U. S. 304; *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Beer Company v. Massachusetts*, 97 U. S. 25, 33; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201.

Appellants contend that a state has the right to discriminate against out of state manufacturers of intoxicating liquors in favor of its own manufacturers, under the Twenty-first Amendment.

This contention is sustained by the court in *State Board of Equalization of California v. Young's Market Co.*, *supra*. On page 62, the court said:

"The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

In the case of *Premier-Pabst Sales Corporation v. Grosscup*, *supra*, the court said, at page 973:

"That the effect of some of the regulations may be to favor domestic products or citizens of the state does not in itself render a state law obnoxious to the provisions of the Fourteenth Amendment."

- B. The application and protection of the equal protection clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

While appellants do not concede that Chapter 390 is unreasonably and arbitrarily discriminatory, they contend that assuming such to be the case, the equal protection clause of the Fourteenth Amendment has no application thereto. In other words, appellants contend that the Twenty-first Amendment has terminated all restrictions upon the state's power over the importation of intoxicating liquors arising out of the previous provisions of the constitution and has left the state free to enact regulatory or prohibitory laws with reference to the importation of such liquors regardless of whether or not such laws are reasonable, arbitrary or discriminatory as tested by the constitutional provisions previous to the enactment of the amendment. The Twenty-first Amendment, under the precedents established in the construction of the Webb-Kenyon Act, and in the construction of the amendment itself, has enabled the states to absolutely control the importation of intoxicating liquors. Consequently the same rule applies to the power of the states as applies to the power of Congress over foreign commerce. In *Buttfield v. Stranahan*, 192 U. S. 470, the court, in passing upon the power of Congress over foreign commerce, said, at page 492:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution."

In like manner the power to regulate importations of intoxicating liquors having been vested in the states by a con-

stitutional amendment, the state is limited only by the provisions of its own constitution. *Bartemeyer v. Iowa*, 18 Wall. 129. We also call the court's attention to *United States v. Lanza*, 260 U. S. 377, discussed by us under subdivision I hereof, and particularly that part of the decision found at page 381 and reading as follows:

"In effect, the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits."

We submit that the principle is the same and that the Twenty-first Amendment freed the states from all constitutional restrictions in so far as the importation of intoxicating liquors is concerned.

In *Premier-Pabst Sales Corporation v. Grosscup*, *supra*, at page 972, the court said:

"Prohibition of all sales of alcohol for use as a beverage we call prohibition. The other modified forms of prohibition we call regulation of the traffic. The test of its legality is by the Webb-Kenyon Act (27 U. S. C. A. Sec. 122) and by the Twenty-first Amendment made the law of the importing state. It might have made the test that applied by the Reed Bill—the law of a prohibition state. It was, however, made otherwise—whether the import would be in violation of any law of the state of importation. This test is a constitutional provision. Such provisions, if conflicting, are subject to the rule applying to conflicting statutes. The latest controls. The provisions of the original Constitution, as of the earlier amendments, must give way to the later."

In this respect, this court, in the case of State Board of Equalization of California v. Young's Market Co., supra, said, at page 64:

"The claim that the statutory provisions and the regulations are void under the equal protection clause may be briefly disposed of. A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

The court, at the same page, then went on to say:

"Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment."

It appears from a reading of the above quoted portion of the case that this court found the California law under attack to be a reasonable exercise of police power, but that if the law had not been reasonable, it still would have been a valid exercise of power under the Twenty-first Amendment and therefore could not be in violation of the Fourteenth Amendment. Unless such is the meaning, the words "a classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth," would have no meaning. If such language has no meaning, it would not have been used.

In said case plaintiffs argued that the history of the Twenty-first Amendment and the decisions of this court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment sustains the argument that the Twenty-first Amendment is limited by the usual tests of reasonableness. The court brushes aside this argument and states, at pages 63, 64:

"As we think the language of the Amendment is clear, we do not discuss these matters."

In addition to the language of the amendment being clear, the history thereof clearly shows that the intention of the

amendment is to grant the powers to the states that are contended for by appellants herein. Without desiring to repeat, we call the court's attention to the statement of Representative McSwaine, Vol. 76, Cong. Rec., p. 4522, as follows:

"The proposed amendment to the Constitution is, in effect, a proposal to repeal the Eighteenth Amendment, but also to give a constitutional guarantee that the transportation or importation into any State of intoxicating liquors, in violation of the laws of such State, shall be prohibited forever."

In other words, the states shall have the absolute control over the traffic in intoxicating liquors both as to importation into and to the use and sale therein.

While this construction on the Twenty-first Amendment appears, at first blush, to be a radical departure from the heretofore established law, when we take into consideration the nature of the merchandise involved and the development of the power of the states to control such merchandise, such a step is a sound one. The right to engage in the trafficking in intoxicating liquors is not an inherent right of a citizen. The traffic in intoxicating liquors is dangerous to the public unless stringently regulated. As is said in *Premier-Pabst Sales Corporation v. Grosscup*, supra, at pages 972, 973:

"The traffic in intoxicating liquors is universally known to be loaded with danger to the public weal. It may be subjected to the most stringent regulation. Licenses to sell to the ultimate consumer may be limited to those who in the conduct of the business can be brought under control and supervision. The traffic is one emphatically 'fraught with a public interest.' No one can claim 'the right and privilege' to do harm to others. The regulation of the traffic by state laws, in the attempt to minimize the evils attending it, is no infringement of the rights of any one. It is no denial of any of 'the

privilege and immunities' of the citizens of the United States. *De Grazier v. Stephens*, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059; *In re Irish*, 121 Kan. 72, 250 P. 1056, 61 A. L. R. 337, and cases cited in notes."

In discussing the meaning of the Twenty-first Amendment, this court in *State Board of Equalization of California v. Young's Market Co.*, *supra*, said, at pages 62, 63:

"The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would not involve a construction of the amendment, but a rewriting of it."

Carrying out this thought further, we contend that the state need not allow nonresidents to import intoxicating liquors on equal terms with each other. This thought is borne out when in the above case the court says, at page 63, that a state to discourage importations may "channelize desired importations by confining them to a single consignee."

The Twenty-first Amendment clearly registers the purpose of the American people to restore to the states their full sovereignty and authority to control intoxicating liquors. This gives the states the power to prohibit, limit or regulate importations thereof and to do so without regard to the limitations of the previous provisions of the Constitution of the United States. To hold otherwise would defeat the purpose of the amendment.

## III.

**FREEDOM OF CONTRACT CLAUSE.**

Laws of Minnesota for 1935, Chapter 390, is not unconstitutional as being in contravention of the freedom of contract clause, Article I, Section 10, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.

**A. Chapter 390 is a reasonable exercise of the police power of the State of Minnesota.**

In this connection it is not necessary to restate appellants' argument as to the reasonableness of the statute under consideration set forth under subsection A of Subdivision II of this brief relating to the equal protection clause. Suffice it to say that if the statute under discussion is a reasonable exercise of the police power of the state, it does not violate the freedom of contract clause, which clause is found in Article I, Section 10, of the Constitution of the United States, and reads:

"No state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts."

In discussing this constitutional provision, the court in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, remarked, at page 672:

"The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other

may be involved in the execution of such contracts. Rights and privileges arising from contracts with a state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

Every contract is entered into subject to the implied limitation that its terms may be varied in a reasonable manner under the exercise of the police power of the state. This limitation upon contract rights is as much a part of any contract as if it were incorporated therein in writing. This is especially true with contracts relative to the intoxicating liquor business where contracts have been entered into for the purchase and sale of such liquors.

In *Manigault v. Springs*, 199 U. S. 473, the court said, at page 480:

"It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

In like manner in *Atlantic Coast Line Railroad Co. v. City of Goldsboro*, 232 U. S. 548, the court said, at page 558:

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the

power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, the court used similar language, at page 376:

"Contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to defeat the legitimate government authority."

In *Marcus Brown Holding Co. v. Feldman*, 269 Fed. 306, affirmed in 256 U. S. 170, the court said, at page 315:

"It cannot be too often said that a constitution is not a code nor a statute, that it declares only fundamental principles, and is not 'to be interpreted with the strictness of a private contract.' *Legal Tender Cases*, 110 U. S. 421, 4 Sup. Ct. 122, 28 L. Ed. 204. To this doctrine we owe the rulings that even the contract clause of the Constitution does not override the power of the state to establish regulations reasonably necessary to secure the health, comfort, or general welfare of the community—that is, to exercise the police power of the state."

- B. The application and protection of the freedom of contract clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.**

In this connection we refer to our discussion under subsection B of subdivision II, relating to the equal protection

clause, and adopt the same argument as applying to the freedom of contract clause with the same force and effect as to the equal protection clause.

#### IV.

#### **DUE PROCESS CLAUSE.**

Laws of Minnesota, Chapter 390, is not unconstitutional as being in contravention of the due process clause, Article XIV, Section 1, of the Constitution of the United States, because such law is a reasonable exercise of the police power of the State of Minnesota, and because the application and protection of such clause has been removed from the importation of intoxicating liquors into a state for sale or use therein by the Twenty-first Amendment to the Constitution of the United States.

##### **A. Chapter 390 is a reasonable exercise of the police power of the State of Minnesota.**

It is not necessary, under this heading, to rediscuss appellants' argument as to the reasonableness of the statute under consideration set forth under subsection A of II of this brief relating to the equal protection clause. If the statute is a reasonable exercise of the police power of the state, it does not offend the due process clause of the Fourteenth Amendment.

The due process clause, Article XIV, Section 1, provides:

"Nor shall any state deprive any person of life, liberty or property, without due process of law; \* \* \*"

It is a well settled doctrine that in legislating in behalf of the public morals, health and safety, the state by reason of

its police power may enact laws which incidentally impair property value, or even destroy it altogether.

Mugler v. Kansas, 123 U. S. 623.

Patsone v. Pennsylvania, 232 U. S. 138.

Silz v. Hesterberg, 211 U. S. 31.

In *Mugler v. Kansas*, 123 U. S. 623, it appeared that the defendants owned certain breweries, the use of which was enjoined by the Kansas Prohibition Act. Plaintiff contended that they were under the protection of the Fourteenth Amendment and compensation should be paid before the Act was put into effect. The court, speaking through Justice Harlan, said, at pages 668, 669:

"As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it; but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the

safety of the public, is not—and, consistently with the existence and safety of organized society, can not be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury on the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, where by its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.

"It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. Indeed, as was said in *Stone v. Mississippi*, above cited, the supervision of the public health and the public morals is a governmental power, 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require;' and that, 'for this purpose, the largest legislative discretion is allowed, and the discretion can not be parted with any more than the power itself.' "

In *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243, the court said, at page 253:

"But it is equally the doctrine of this court that the power, whether called police, governmental or legislative, exists in each State, by appropriate legislation, not forbidden by its own constitution or by the Constitution of the United States, to determine for its people all questions or matters relating to its purely domestic or internal affairs, and, 'to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public con-

venience and the public good.' *Lake Shore and Michigan Southern Railway v. Ohio*, 173 U. S. 285, 297, and authorities there cited."

Chapter 390, being a law enacted in the reasonable police power of the state, is not in violation of the due process clause of the federal constitution. This law does not interfere with any vested property rights. The right to engage in the liquor business is at sufferance only and carries with it no vested rights. The sale of such liquors may be abolished at the will of the state and plaintiffs' businesses, totally destroyed and such destruction would be perfectly valid.

**B. The application and protection of the due process clause has been removed from the importation of intoxicating liquors into a state for sale and use therein by the Twenty-first Amendment to the Constitution of the United States.**

In this connection we refer to our discussion under subsection B of subdivision II, relating to the equal protection clause, and adopt the same argument as applying to the due process clause with the same force and effect as to the equal protection clause.

## V.

### CONCLUSION.

Appellants contend that inasmuch as the State of Minnesota has enacted laws regulating the importation, use and traffic in intoxicating liquors, the Twenty-first Amendment to the Constitution of the United States has removed the protection and application of the commerce clause, equal protection clause, freedom of contract clause and due process

clause from such liquors imported into the State of Minnesota for the purpose of use and sale therein; that the provisions of Laws of 1935, Chapter 390, do not unreasonably and arbitrarily discriminate against such importation; and further that said statute is a reasonable exercise of the police power of the State of Minnesota.

It is, therefore, respectfully submitted that this court should review the decision of the District Court for the District of Minnesota, Fourth Division, reverse it and dissolve the permanent injunction entered in pursuance to the final decree of said court.

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